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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - X
- :
IN THE MATTER OF TERRA :
FIRMA INVESTMENTS (GP) :
LIMITED (for and on behalf : Index No.
of the six limited : 09-CV-10459
partnerships constituting :
the Terra Firma Capital :
Partners II Fund), and :
TERRA FIRM INVESTMENTS (GP) X
3 LIMITED (for and on
behalf of Terra Firma
Capital Partners III, LP)
Plaintiffs,
vs.
CITIGROUP INC., CITIBANK
N.A., CITIGROUP GLOBAL
MARKETS LIMITED and
CITIGROUP GLOBAL MARKETS
INC.,
Defendants.

- - - - -

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08:04:52 2 A. No.

08:04:52 3 Q. Have you ever previously done
08:04:56 4 any work for any of the Terra Firma entities?

08:05:02 5 A. No, I don't think I have.

08:05:04 6 Q. Have you ever done any work for
08:05:09 7 Guy Hands?

08:05:10 8 A. No.

08:05:11 9 Q. How much are you being paid?

08:05:13 10 A. I am told 700 pounds an hour.

08:05:19 11 Q. Okay. Now, referring to
08:05:30 12 Exhibit 1, your report, did you write it
08:05:33 13 yourself?

08:05:34 14 A. Yes.

08:05:34 15 Q. Did anyone help you write any
08:05:39 16 part of it?

08:05:40 17 A. I don't have anyone to help me
08:05:42 18 write it.

08:05:45 19 Q. Okay. Fair enough.

08:05:46 20 Did you review your report in
08:05:48 21 preparation for your deposition?

08:05:50 22 A. Yes.

08:05:53 23 Q. So have you reviewed it in,
08:05:55 24 say, the last 48 hours?

08:05:56 25 A. Yes, I have.

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08:05:57 2 Q. Having done so, are you aware
08:06:01 3 of anything in your report that you believe is
08:06:04 4 inaccurate?

08:06:05 5 A. No, I am not.

08:06:06 6 Q. Is there anything in your
08:06:08 7 report that you would like to retract?

08:06:11 8 A. No.

08:06:12 9 Q. Is there anything that you
08:06:13 10 would like to change or clarify in any way?

08:06:16 11 A. No.

08:06:16 12 Q. Now, you were asked to assume
08:06:23 13 that the allegations set out in the complaint
08:06:26 14 are well-founded. Is that correct?

08:06:29 15 A. That is correct.

08:06:30 16 Q. And did you do that?

08:06:32 17 A. I did.

08:06:32 18 Q. Did you do anything to verify
08:06:38 19 any of the allegations in the complaint?

08:06:43 20 A. No.

08:06:43 21 Q. Did the allegations in the
08:06:44 22 complaint strike you as plausible?

08:06:47 23 A. I --

08:06:47 24 MR. GRAVANTE: Objection to the
08:06:48 25 form.

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08:06:50 2 A. That seemed to me something
08:06:52 3 entirely outside of what I was being asked to
08:06:54 4 do.

08:06:59 5 Q. I take it you reviewed the
08:07:04 6 complaint in connection with your work, right?

08:07:04 7 A. Yes.

08:07:05 8 Q. Did you review anything else?

08:07:10 9 A. I reviewed the -- the defense
08:07:15 10 document I think I saw.

08:07:18 11 Q. In the U.S. we call that an
08:07:22 12 Answer?

08:07:22 13 A. Yes. I think I saw that. But
08:07:24 14 I only looked at it fairly cursorily because
08:07:28 15 of the assumptions I was asked to make.

08:07:33 16 I think I was also shown a few
08:07:37 17 -- several authorities on Section 397 and the
08:07:45 18 City Code.

08:07:47 19 Q. Who showed you those
08:07:49 20 authorities?

08:07:50 21 A. Clyde & Co.

08:07:53 22 Q. Do you remember what those
08:08:01 23 authorities were?

08:08:02 24 A. No. But I remember thinking
08:08:04 25 that none of them were relevant.

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08:08:07 2 Q. Did you do any independent
08:08:12 3 research in connection with preparing your
08:08:14 4 report?

08:08:15 5 A. Yes. I --

08:08:23 6 Q. I apologize. Please finish
08:08:25 7 your answer. Tell me what you did.

08:08:26 8 A. Well, I had to review the
08:08:33 9 series, the Financial -- FSMA, the Financial
08:08:40 10 Services and Market Act has a number of
08:08:42 11 statutory instruments which have been enacted
08:08:50 12 subsequent to it, and it was necessary to look
08:08:51 13 at a number of those. And I think I refer to
08:08:54 14 a number of those in my report.

08:08:59 15 I think I looked at some
08:09:02 16 textbooks on securities law and financial
08:09:07 17 services. I think I looked for case law which
08:09:15 18 might assist in any of these questions. And I
08:09:21 19 think that was -- that was what I looked at.

08:09:24 20 Q. Do you recall any of the
08:09:26 21 textbooks that you reviewed?

08:09:28 22 A. There's a book on securities
08:09:30 23 law, the author of which I'm afraid I can't
08:09:33 24 remember. I looked at that. There's also a
08:09:39 25 book on financial services law written, I

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08:09:42 2 think, by somebody called Blair.

08:09:46 3 Q. Okay. And you said you looked

08:09:49 4 to see if there was any case law. Did you

08:09:53 5 find any cases that you thought were relevant?

08:09:55 6 A. No.

08:09:57 7 Q. Do you recall reviewing any

08:10:01 8 other legal authorities in preparation of your

08:10:03 9 report?

08:10:05 10 A. I think I looked -- no. I

08:10:19 11 can't recall any other authorities that I

08:10:22 12 reviewed.

08:10:24 13 Q. Did you discuss your opinion

08:10:31 14 with any of your colleagues at Brick Court

08:10:35 15 Chambers?

08:10:37 16 A. I think I may have done

08:10:42 17 subsequent to it.

08:10:45 18 Q. Who do you think you discussed

08:10:47 19 it with?

08:10:49 20 A. I think I talked to somebody

08:10:56 21 called Mr. Adam.

08:11:01 22 Q. What do you recall of your

08:11:02 23 discussion with Mr. Adam?

08:11:03 24 A. He told me I was right.

08:11:09 25 Q. I take it you had given him a

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08:11:13 2 copy of the document to read?

08:11:14 3 A. No, I hadn't.

08:11:15 4 Q. Okay. Just an oral

08:11:18 5 conversation?

08:11:19 6 A. Just an oral conversation.

08:11:20 7 Q. I guess I should have asked you

08:11:28 8 this earlier. Attached as Appendix 1 to your

08:11:31 9 report is your -- a printout of your full CV

08:11:37 10 from Brick Court Chambers; is that right?

08:11:39 11 A. Yes.

08:11:39 12 Q. And does that appendix fairly

08:11:43 13 and accurately summarize your experience and

08:11:46 14 qualifications?

08:11:47 15 A. Yes, it does. I think if you

08:11:49 16 look at the Brick Court website now, there is

08:11:52 17 a very slightly updated version of this. But

08:11:56 18 I don't think you'll find it is different in

08:12:00 19 any material way.

08:12:03 20 Q. Okay. Since you wrote your

08:12:08 21 report, have you been given any additional

08:12:11 22 information about the allegations in the

08:12:14 23 complaint?

08:12:15 24 A. I think I have been given some

08:12:21 25 additional information, but I saw the veracity

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08:12:31 2 of the allegations is outside what I was asked
08:12:34 3 to do.

08:12:38 4 Q. Well, what is the additional
08:12:40 5 information you think you were given?

08:12:42 6 A. Well, I was given some -- some
08:12:45 7 information, in fairly broad terms, by
08:12:47 8 counsel.

08:12:51 9 Q. Can you tell me you what it
08:12:52 10 was?

08:12:53 11 A. I think counsel told me that it
08:12:58 12 was alleged that there were, I think, three
08:13:00 13 different misrepresentations by Mr. Wormsley
08:13:05 14 on three different dates. And I think counsel
08:13:10 15 told me, in very broad terms, what Terra Firma
08:13:14 16 were alleging, which perhaps went slightly
08:13:20 17 further than the pleadings. But I'm not sure
08:13:22 18 I can remember precisely what I was told.

08:13:26 19 Q. Well, have you reviewed any
08:13:28 20 documents that were produced by the parties in
08:13:30 21 the case?

08:13:32 22 A. When you say "documents," do
08:13:34 23 you include reports, or are you talking about
08:13:40 24 contemporaneous documents?

08:13:41 25 Q. Yeah, I meant the sort of

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08:13:44 2 evidentiary documents that are produced in the
08:13:48 3 course of American discovery.

08:13:50 4 A. Sorry.

08:13:51 5 Q. Do you understand what I mean?

08:13:52 6 A. No. We're talking about what I
08:13:53 7 call contemporaneous documents. You're not
08:13:55 8 talking about witness statements or anything
08:13:57 9 like that, are you?

08:13:57 10 Q. Correct.

08:13:59 11 A. No, I haven't seen any such
08:14:02 12 documents.

08:14:03 13 Q. Okay. And have you reviewed
08:14:04 14 any transcripts of any testimony?

08:14:07 15 A. No.

08:14:07 16 Q. Okay. You referred to witness
08:14:10 17 statements or reports. Have you reviewed
08:14:12 18 other witness statements?

08:14:14 19 A. No.

08:14:15 20 Q. Have you reviewed any other
08:14:17 21 expert reports?

08:14:19 22 A. Yes, I have.

08:14:21 23 Q. Which ones?

08:14:22 24 A. I think I saw two reports by
08:14:24 25 Mr. Coppin.

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08:14:29 2 Q. Any others?

08:14:29 3 A. No.

08:14:31 4 Q. Did you have a view on what you
08:14:42 5 read in Mr. Coppin's reports?

08:14:46 6 A. Well, a lot of what he was
08:14:47 7 dealing with was -- was not concerned -- was
08:14:49 8 not -- did not relate to the matters in my
08:14:51 9 report. I think there is one paragraph in his
08:14:57 10 reply or supplemental report which deals with
08:15:00 11 a -- which deals with my report. Sorry. I'm
08:15:10 12 not sure that answered the question. But that
08:15:12 13 was the only passage I was concerned with.

08:15:14 14 Q. Okay. And did you agree or
08:15:17 15 disagree with what Mr. Coppin wrote?

08:15:19 16 A. I disagreed with it.

08:15:20 17 Q. Okay. Referring now to
08:15:31 18 Exhibit 1, does your report contain all of
08:15:36 19 your opinions and conclusions regarding this
08:15:39 20 case?

08:15:39 21 A. Yes.

08:15:40 22 Q. So let me ask the question in
08:15:56 23 the opposite way now for the clarity. Do you
08:15:58 24 have any opinions or conclusions that are
08:16:01 25 relevant to this case that are not contained

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08:16:03 2 in your report, Exhibit 1?

08:16:05 3 A. No.

08:16:06 4 Q. Okay. Broadly speaking, your

08:16:15 5 report concerns two subjects, Section 397 of

08:16:21 6 FSMA, and then the City Code. So I would like

08:16:24 7 to start with Section 397 of FSMA, if that's

08:16:28 8 okay.

08:16:28 9 A. That's fine.

08:16:32 10 Q. Just broadly speaking, what is

08:16:33 11 the FSMA?

08:16:34 12 A. The Financial Services and

08:16:38 13 Markets Act.

08:16:38 14 Q. That was a statute passed in

08:16:41 15 the year 2000; is that correct?

08:16:43 16 A. That's correct.

08:16:43 17 Q. Okay. And what is your

08:16:44 18 understanding of the purpose of the FSMA?

08:16:48 19 A. It is a wide-ranging statute to

08:16:54 20 regulate the financial services market and at

08:16:59 21 least to an extent, it replaces the previous

08:17:01 22 regime, which was under the Financial Services

08:17:05 23 Act 1986.

08:17:09 24 Q. What is your understanding of

08:17:10 25 the purpose of Section 397?

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08:17:12 2 A. It provides criminal liability
08:17:15 3 for misleading, false and deceptive
08:17:19 4 statements.

08:17:19 5 Q. Would you agree that, broadly
08:17:22 6 speaking, Section 397 of the FSMA replaces
08:17:28 7 Section 47 of the predecessor statute
08:17:35 8 Financial Services Act of 1986?

08:17:37 9 A. I haven't reviewed that point.

08:17:39 10 Q. Okay. How many cases have you
08:17:45 11 personally handled where Section 397 was
08:17:48 12 implicated?

08:17:49 13 A. None.

08:17:49 14 Q. I'm sorry, I didn't hear your
08:17:57 15 answer, sir.

08:17:58 16 A. I said "None." None.

08:17:59 17 Q. None.

08:18:00 18 A. So are you having problems
08:18:02 19 hearing me?

08:18:03 20 Q. Just occasionally when you
08:18:04 21 speak down. Generally it's going fine.

08:18:06 22 A. All right.

08:18:07 23 Q. How many times have you
08:18:09 24 previously given written advice relating to
08:18:11 25 Section 397?

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08:18:12 2 A. I don't believe I have given
08:18:13 3 written advice on Section 397 before.

08:18:21 4 Q. Okay. Now, I think you have
08:18:33 5 said, in a prior answer --

08:18:38 6 MR. BAUGHMAN: Well, withdrawn.

08:18:40 7 Q. Section 397 is a criminal
08:18:43 8 statute, correct?

08:18:44 9 A. Yes, it is.

08:18:44 10 Q. Which means that in order for a
08:18:55 11 violation of Section 397 to be proven, it
08:19:00 12 would have to be proven beyond a reasonable
08:19:02 13 doubt, correct?

08:19:03 14 A. That's correct.

08:19:03 15 Q. And every element of the
08:19:06 16 offense would have to be proven beyond a
08:19:08 17 reasonable doubt, correct?

08:19:09 18 A. As far as I'm aware, that's
08:19:11 19 correct.

08:19:11 20 Q. Okay. To your knowledge, does
08:19:15 21 a private party have any right, under English
08:19:19 22 law, to bring a proceeding to obtain a
08:19:25 23 recovery upon proof of a violation of
08:19:28 24 Section 397?

08:19:30 25 A. I haven't reviewed this

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08:19:32 2 specifically. I think the answer is no, but
08:19:35 3 of course a private party would have claims in
08:19:38 4 fraud, which would largely overlap.

08:19:41 5 Q. Okay. But are you aware of any
08:19:45 6 authority that would support the proposition
08:19:48 7 that a private party can bring an action under
08:19:52 8 Section 397 of the FSMA?

08:19:56 9 A. Your -- your question is asking
08:20:00 10 on the -- simply limited to the statute as
08:20:03 11 opposed to the facts, which would give rise to
08:20:05 12 the statute. As far as I am aware --

08:20:07 13 Q. That's correct.

08:20:08 14 A. -- I haven't reviewed it
08:20:09 15 specifically, but I don't -- I don't think
08:20:11 16 that in itself would give rise to a private
08:20:14 17 cause of action. But of course the facts --
08:20:16 18 the facts alleged almost certainly would.

08:20:19 19 Q. Okay. Well, we'll talk about
08:20:22 20 that maybe in a minute.

08:20:28 21 Now, sticking with Section 397
08:20:31 22 for a moment.

08:20:38 23 MR. BAUGHMAN: Brian, why don't
08:20:42 24 we mark the statute as Exhibit 2 and hand a
08:20:44 25 copy to Mr. Hollander, please, or

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08:20:46 2 Mr. Hollander, you can look at paragraph 6 of
08:20:49 3 your report; whichever is easier.

08:20:51 4 THE WITNESS: Thank you.

5 MR. BAUGHMAN: We'll give you
6 the whole statute. Let me know when you have
08:21:12 7 it.

08:21:12 8 ---

9 (Hollander Exhibit 2 was marked
10 for identification.)

11 ---

12 THE WITNESS: I have it.

08:21:16 13 BY MR. BAUGHMAN:

08:21:16 14 Q. Okay. Let me direct your
08:21:17 15 attention to paragraph 6 of your report.

08:21:22 16 A. Yes.

08:21:23 17 Q. In that paragraph of your
08:21:25 18 report, you cite, or you quote three
08:21:32 19 subsections of Section 397, or parts of them:
08:21:35 20 Section -- subsection 1, 2 and 3, right?

08:21:39 21 A. Yes.

08:21:39 22 Q. Okay. You would agree that
08:21:41 23 subsection 1 sets out the requisite mental
08:21:46 24 states, right?

08:21:52 25 A. That's part of what it does.

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09:25:37 2 transaction.

09:25:41 3 Q. And if I could direct your
09:25:42 4 attention to paragraph 144 of the Complaint on
09:25:48 5 page 36 it says, quote, "In the absence of any
09:25:52 6 competing bid, EMI's Board of Directors
09:25:55 7 accepted the offer on May 21, 2007." End
8 quote.

09:25:59 9 My question, Mr. Hollander: Is
09:26:02 10 that a principal transaction or an agency
09:26:05 11 transaction?

09:26:05 12 A. That's a --

09:26:05 13 MR. GRAVANTE: Objection to the
09:26:06 14 form.

09:26:06 15 THE WITNESS: Sorry.

09:26:06 16 A. That is a principal principal
09:26:10 17 transaction.

09:26:13 18 Q. Okay. Having reviewed the
09:26:15 19 Complaint in connection with your -- the
09:26:18 20 preparation of your report, can you point me
09:26:19 21 to any allegations in the Complaint that you
09:26:24 22 would say describe an agency transaction?

09:26:33 23 A. The Complaint assumes that --
09:26:39 24 or pleads that this would be a principal
09:26:41 25 transaction, but I think the statutory

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09:26:49 2 instrument paragraph relating to agency is
09:26:53 3 still material because, as we have previously
09:26:58 4 discussed, what is relevant is the intention
09:27:03 5 rather than the consequence, and it would not
09:27:07 6 be a defense to Mr. Wormsley of criminal
09:27:11 7 liability to say, "I thought the transaction
09:27:18 8 might have been as agent rather than
09:27:19 9 principal."

09:27:22 10 Q. Have you finished your answer?

09:27:23 11 A. I have finished my answer.

09:27:25 12 Q. Are you aware of any
09:27:29 13 allegations in the Complaint that you believe
09:27:33 14 support the conclusion that Mr. Wormsley
09:27:37 15 thought what was being contemplated was an
09:27:41 16 agency transaction?

09:27:43 17 MR. GRAVANTE: Objection to the
09:27:44 18 form.

09:27:45 19 A. I don't -- I don't think there
09:27:53 20 is an allegation which pleads that he thought
09:27:56 21 it was an agency transaction.

09:27:59 22 Q. So now let's discuss principal
09:28:01 23 transactions. Could I ask you to turn to
09:28:08 24 Article 14 of the Regulated Activities Order,
09:28:21 25 which I believe is Exhibit 6.

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09:28:40 2 A. Yes.

09:28:41 3 Q. I believe it's on page 30 of
09:28:42 4 Exhibit 6. Are you there, sir?

09:28:43 5 A. Yes.

09:28:44 6 Q. And that relates to dealing in
09:28:46 7 investments as principal, correct?

09:28:49 8 A. Yes.

09:28:49 9 Q. Now, would you agree that that
09:28:55 10 Article 14 dealing with investments as
09:28:57 11 principal more closely fits the facts as
09:28:59 12 alleged in the Complaint than Article 21 about
09:29:02 13 an agency transaction?

09:29:04 14 A. I agree it more closely fits
09:29:06 15 the facts in the Complaint. But as I have
09:29:10 16 said before, I think the agency provision is
09:29:13 17 relevant because it takes away a possible
09:29:17 18 defense that Mr. Wormsley might have.

09:29:24 19 Q. Is your opinion that Article 14
09:29:26 20 applies to the analysis of the transaction in
09:29:29 21 this case?

09:29:29 22 A. Yes.

09:29:30 23 Q. In making that opinion, did you
09:29:33 24 consider Article 70 of the Regulated
09:29:39 25 Activities Order?

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09:29:44 2 A. I need to look at Article 70.

09:30:01 3 Q. It's on page 110.

09:30:02 4 A. Thank you.

09:30:20 5 ---

6 (Witness reviewing document.)

09:30:33 7 ---

09:30:33 8 Q. Take as much time as you want

09:30:34 9 to look at it, sir, but just so that the

09:30:36 10 record is clear, my question is: Did you

09:30:38 11 consider Article 70 in formulating your

09:30:42 12 opinions in this case?

09:30:44 13 A. I can't recall specifically.

09:30:53 14 Q. Okay. Well, let's look at

09:30:55 15 Article 70. Subsection (1) says: "A person

09:30:58 16 does not carry on an activity, of the kind

09:31:01 17 specified by Article 14, by entering as

09:31:05 18 principal into a transaction if, A, the

09:31:12 19 transaction is one to acquire or dispose of

09:31:14 20 the shares in a body corporate, other than an

09:31:17 21 open-ended investment company, or is entered

09:31:21 22 into for the purposes of such an acquisition

09:31:24 23 or disposal ..." stopping there. You would

09:31:28 24 agree that this is a transaction to acquire or

09:31:30 25 dispose of shares in a body corporate, right?

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09:31:33 2 A. Yes.

09:31:33 3 Q. EMI was a body corporate,
09:31:35 4 right?

09:31:36 5 A. Yes.

09:31:36 6 Q. Okay. "And --" continuing on,
09:31:42 7 "either the condition set out in paragraph (2)
09:31:48 8 are met," right? Do you see that?

09:31:50 9 A. I see that.

09:31:51 10 Q. And if we go to paragraph (2),
09:31:54 11 it says, "The conditions mentioned in
09:31:56 12 paragraph (1)(b) are that, A, the shares
09:32:01 13 consist of or include 50 percent or more of
09:32:04 14 the voting shares of the body corporate."

09:32:08 15 That covers the transaction in
09:32:10 16 this case, doesn't it, sir?

09:32:14 17 A. Yes.

09:32:16 18 Q. This was a transaction for --

09:32:19 19 MR. BAUGHMAN: Withdrawn.

09:32:20 20 Q. The transaction being
09:32:22 21 contemplated in this case was an acquisition
09:32:25 22 of all of the shares of the body corporate
09:32:29 23 EMI, right?

09:32:30 24 A. Yes.

09:32:30 25 Q. So isn't it a fact, sir, that

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09:32:34 2 under Article 70, Article 14 does not apply?

09:32:44 3 MR. GRAVANTE: Objection to the
09:32:45 4 form.

09:33:01 5 ---

6 (Witness reviewing document.)

09:33:02 7 ---

09:33:02 8 A. I think I'd need to look at
09:33:03 9 this in some detail.

09:33:06 10 Q. Okay. Take your time.

09:33:08 11 A. Mm-hmm.

09:33:09 12 Q. My question is: Given the
09:33:11 13 language of Article 70, how could it be that
09:33:14 14 Article 14 could apply?

09:33:41 15 ---

16 (Witness reviewing document.)

09:34:22 17 ---

09:34:22 18 A. I need to look at it in a bit
09:34:24 19 of -- I need to look at it in detail. If it's
09:34:27 20 right that Article 14 doesn't -- doesn't
09:34:28 21 apply, then there must be a different article
09:34:31 22 of the Regulated Activities Order that does
09:34:35 23 apply.

09:34:35 24 Q. Okay.

25 A. It's plain that --

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09:34:36 2 Q. Can you cite to me any such
09:34:37 3 provision as you sit here today?

09:34:38 4 A. Well, I need to look at it. I
09:34:40 5 thought Article 14 applied, but it's obvious
09:34:43 6 that the Regulated Activities Order was
09:34:45 7 intended to cover this and does cover this,
09:34:48 8 and it's simply a question of identifying what
09:34:49 9 the provision is.

09:34:50 10 Q. Okay. Look at subsection (4)
09:34:52 11 of Article 70.

09:34:55 12 A. Yes.

09:34:55 13 Q. That says, "A person does not
09:34:58 14 carry on an activity of the kind specified by
09:35:01 15 Article 21 by entering as agent into a
09:35:04 16 transaction of the kind described in paragraph
09:35:05 17 (1)."

09:35:06 18 A. Yes.

09:35:06 19 Q. Do you see that, sir?

09:35:07 20 A. Yes, I see that.

09:35:08 21 Q. Did you consider that in
09:35:10 22 formulating your opinion that Article 21
09:35:13 23 applied?

09:35:16 24 A. It's the same point, isn't it?
09:35:19 25 It looks like the same point, in which case it

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09:35:21 2 must be a different provision.

09:35:22 3 Q. So you would need to study the
09:35:24 4 point further; that's your testimony today?

09:35:26 5 A. Well, it's -- there's no doubt
09:35:27 6 that Section 397 applies to this. It's a
09:35:31 7 question of identifying the relevant provision
09:35:35 8 of the Regulated Activities Order. It is
09:35:38 9 possible that I -- it may be that I've got the
09:35:41 10 wrong provision in paragraph 13 and that I
09:35:43 11 should correct that by identifying the right
09:35:45 12 provision, which I can't do here and now. But
09:35:48 13 there can be no doubt that Section 397 applies
09:35:52 14 in these circumstances.

09:35:57 15 Q. Okay. Do you have any citation
09:36:01 16 of authority for that proposition, sir?

09:36:04 17 A. Well, I don't think there's any
09:36:06 18 real doubt that it applies. It would be -- it
09:36:10 19 would defeat the purpose of Section 397 if it
09:36:13 20 doesn't apply. But I can see that I may need
09:36:17 21 to correct paragraph 13 of my report.

09:36:20 22 Q. Okay. But other than your
09:36:22 23 analysis of the text of the statute, can you
09:36:25 24 cite for me any legal authority for the
09:36:28 25 proposition that Mr. Wormsley's conduct would

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09:36:31 2 violate Section 397?

09:36:35 3 A. Well --

09:36:36 4 MR. GRAVANTE: Objection to the
09:36:36 5 form.

09:36:36 6 A. -- I don't really understand
09:36:39 7 the question. Section 397 will be applicable
09:36:43 8 to this. It's a question of identifying the
09:36:46 9 right provision of the Regulated Activities
09:36:50 10 Order. It would run a coach and horses
09:36:56 11 through the statutory purpose if it didn't
09:36:58 12 apply.

09:36:58 13 Q. I'm sorry, sir. I couldn't
09:37:00 14 hear the last answer.

09:37:01 15 MR. BAUGHMAN: Could the court
09:37:02 16 reporter read it back for me, please?

09:37:08 17 A. I said -- what I said, if I can
09:37:09 18 help, is that it would drive a coach and
09:37:11 19 horses through the statutory framework if it
09:37:14 20 didn't apply. It must apply.

09:37:17 21 Q. Okay. But, again, my question
09:37:18 22 is: Can you cite for me any legal authority
09:37:22 23 for the proposition, other than your own
09:37:25 24 personal textual analysis of the statute?

09:37:27 25 A. Well --

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09:37:28 2 MR. GRAVANTE: Objection to the
09:37:28 3 form.

09:37:29 4 A. -- it's simply a question of
09:37:31 5 correcting paragraph 13 of my report.

09:37:49 6 Q. Okay. Well, let's -- okay.
09:37:49 7 Now, I want to ask you about one thing in your
09:37:54 8 report. There is -- take your report, section
09:38:03 9 -- in Exhibit 1, your report?

09:38:08 10 A. Yes.

09:38:08 11 Q. You note in your report, in
09:38:11 12 footnote -- I'd like to direct your attention
09:38:13 13 to footnote 3 on page 4 of your report. Tell
09:38:18 14 me when you're there.

09:38:22 15 A. Yes, I'm there.

09:38:22 16 Q. Okay.

09:38:24 17 A. Sorry. Footnote -- footnote 4?

09:38:26 18 Q. I apologize, sir. Footnote 3
09:38:28 19 on page 4.

09:38:29 20 A. Yes, I'm with you.

09:38:30 21 Q. Okay. You're referring there
09:38:36 22 to some of the statutory defenses that are set
09:38:40 23 out in Section 397 (5), right?

09:38:43 24 A. 397 (3).

09:38:46 25 Q. Well, 397 (3) is the offense,

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09:38:49 2 and the defenses are in 397 (5), right?

09:38:52 3 A. Yes.

09:38:52 4 Q. Okay. And you give the opinion

09:38:59 5 that that defense -- well, you're referring --

09:39:02 6 you say, "The defense is a person who may

09:39:05 7 reasonably believe that his act or conduct

09:39:07 8 would not create an impression that was false

09:39:09 9 or misleading as to the matters such in this

09:39:12 10 section." But then you give the opinion,

09:39:14 11 "This could not be relevant on the facts

09:39:16 12 alleged by Terra Firma." That's your opinion?

09:39:19 13 A. That's on the basis of the

09:39:21 14 facts alleged by Terra Firma.

09:39:23 15 Q. Okay. Why is that defense not

09:39:25 16 relevant?

09:39:35 17 A. Well, for example, paragraph

09:39:37 18 137 of the Complaint, "Citi's representations

09:39:40 19 to Terra Firma were knowingly false and were

09:39:42 20 deliberately and maliciously designed to

09:39:44 21 fabricate a false competitive landscape that

09:39:48 22 would elicit a bid from Terra Firma."

09:40:02 23 Q. Okay. So it's your opinion

09:40:03 24 that if the facts in 137 are true, then the

09:40:11 25 defense would fail, right?

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09:44:45 2 ---

3 (Hollander Exhibit 8 was marked
4 for identification.)

09:44:46 5 ---

09:44:46 6 BY MR. BAUGHMAN:

09:44:46 7 Q. Do you have it, sir?

09:44:50 8 A. I have it.

09:44:50 9 Q. Okay. I'm going to direct your
09:44:51 10 attention to the page 2A 496, which is
09:45:01 11 commentary about Section 5 -- or subsection
09:45:04 12 (5) of Section 397.

09:45:08 13 A. So we're looking at 397 (5)?

09:45:12 14 Q. And I'm on page 2A 496. Let me
09:45:15 15 know when you're there, okay?

09:45:19 16 A. 2A 496. Yes.

09:45:21 17 Q. Okay. I'm going to direct your
09:45:23 18 attention to the passage I want to ask you
09:45:25 19 about, but before you answer, please feel free
09:45:28 20 to read whatever else you want, okay?

09:45:30 21 A. Yes.

09:45:30 22 Q. But first what I want to ask
09:45:31 23 you about is in the bottom paragraph, about
09:45:35 24 six lines from the bottom -- excuse me -- six
09:45:38 25 lines from the top, it says, "The first

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09:45:44 2 defense, (subsection (5)(a), is that the
09:45:46 3 defendant 'reasonably believed' that the
09:45:48 4 impression he was creating was not 'false or
09:45:51 5 misleading'. The test is part subjective (the
09:45:56 6 defendant must actually have believed the
09:45:56 7 impression was not false) and part objective
09:45:59 8 (he must have reasonably so believed.)"

09:46:02 9 And my question for you,
09:46:03 10 Mr. Hollander, is: Do you disagree with that?

09:46:07 11 A. Let me think about that for a
09:46:09 12 moment. (Pause.) Yes, I do agree with that.

09:46:32 13 Q. Okay. All right.

09:46:34 14 Let me now ask you about the
09:46:37 15 City Code, which is the other section of your
09:46:39 16 report. We're going to leave Section 397.

09:46:47 17 It's your opinion that
09:46:49 18 Mr. Wormsley's conduct violated general
09:46:56 19 principle 4 of the City Code; is that right?

09:46:59 20 A. That's right.

09:47:00 21 Q. Does the City Code provide a
09:47:02 22 private right of action?

09:47:04 23 A. No. But it will often be the
09:47:07 24 case that if there is a breach of the City
09:47:11 25 Code, the facts will give rise to private

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09:47:13 2 rights of action.

09:47:15 3 Q. Okay. But could Terra Firma
09:47:19 4 bring a claim in court to seek damages for a
09:47:22 5 violation of general principle 4 of the City
6 Code?

09:47:27 7 A. No. They --

09:47:27 8 MR. GRAVANTE: Objection to the
09:47:28 9 form.

09:47:28 10 A. They would not plead it as a
09:47:31 11 breach of the code. They would plead the
09:47:33 12 facts, and the facts may well and indeed would
09:47:39 13 probably give rise to a cause of action.

09:47:43 14 Q. What body enforces the City
09:47:47 15 Code?

09:47:47 16 A. Well, it has -- it has
09:47:54 17 statutory course, as -- as I set out in
09:47:59 18 paragraph 16.

09:48:07 19 Q. Okay. It says the -- in
09:48:09 20 paragraph 16 of your report it says, "The
09:48:12 21 regulatory body which oversees mergers and
09:48:15 22 takeovers in the United Kingdom is the Panel
09:48:19 23 on Takeovers and Mergers," right?

09:48:20 24 A. Yes.

09:48:20 25 Q. How many times have you

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09:48:21 2 appeared before the Panel?

09:48:22 3 A. I haven't appeared in front of
09:48:23 4 the Panel in my practice.

09:48:27 5 Q. It is also the case that --

09:48:41 6 MR. BAUGHMAN: Well, withdrawn.

09:48:42 7 Q. How many times in your career
09:48:43 8 have you given written advice regarding
09:48:48 9 general principle 4 of the City Code before
09:48:52 10 this?

09:48:52 11 A. I don't believe I have. I've
09:48:53 12 had to look at it. You may have seen, from my
09:48:57 13 curriculum vitae, that I write a book on
09:48:58 14 conflicts of interest, and I have looked at it
09:49:03 15 particularly in the context of conflicts of
09:49:05 16 interest, which involves looking at the
09:49:07 17 various principles. I don't believe I have
09:49:11 18 ever given advice on principle 4.

09:49:15 19 Q. What are the disciplinary
09:49:22 20 measures available to the Takeover Panel?

09:49:26 21 A. They -- if you look -- I think
09:49:34 22 you need to look at the Section 946, I think
09:49:44 23 it is, of The Companies Act, 2006, to which I
09:49:46 24 referred in paragraph 16. The Panel is
09:49:50 25 empowered to give rulings. It is empowered to

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09:49:55 2 give directions to restrain actions in breach
09:49:57 3 of the rules, and to compel compliance with
09:50:00 4 the rules.

09:50:06 5 MR. BAUGHMAN: Could I ask the
09:50:07 6 court reporter to read the answer back? It
09:50:08 7 was breaking up on the transmission, and I
09:50:12 8 just couldn't hear it.

09:50:35 9 (The reporter read back as
10 follows:

09:49:34 11 "Answer: I think you need to
09:49:35 12 look at the Section 946, I think it is, of The
09:49:45 13 Companies Act, 2006, to which I referred in
09:49:47 14 paragraph 16. The Panel is empowered to give
09:49:52 15 rulings. It is empowered to give directions
09:49:55 16 to restrain actions in breach of the rules,
09:49:58 17 and to compel compliance with the rules.")

09:50:39 18 BY MR. BAUGHMAN:

09:50:47 19 Q. Who sits on the Panel?

09:50:49 20 A. That's not something I have
09:50:54 21 looked at specifically for the purpose of
09:50:56 22 this. There are a number of people appointed.

09:51:00 23 Q. Are they lawyers?

09:51:01 24 A. Not normally. There may be
09:51:04 25 some lawyers.

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09:51:10 2 Q. Do you have any experience in,
09:51:13 3 or understanding of the methods the members of
09:51:16 4 the Panel use to make their determinations?

09:51:18 5 A. No.

09:51:22 6 Q. Do you have any experience or
09:51:23 7 expertise in what standards the panel would
09:51:29 8 apply in determining whether or not there had
09:51:32 9 been a breach of general principle 4?

09:51:35 10 A. I think I would need to look at
09:51:37 11 that specifically.

09:51:39 12 Q. Do you have any experience or
09:51:41 13 understanding of what defenses the panel
09:51:45 14 ordinarily considers when it's considering an
09:51:48 15 allegation of a breach of general principle 4?

09:51:51 16 A. Well, the principles are
09:51:54 17 drafted, as one can see from them, in broad
09:52:00 18 terms, and unlike the statute, which has very
09:52:03 19 specific requirements, the general principles
09:52:07 20 are very broad, and they are not defined in
09:52:12 21 precise terms, and so they are -- they're
09:52:19 22 deliberately much more in the form of what one
09:52:22 23 might describe as core duties.

09:52:28 24 Q. Thank you, sir, but that wasn't
09:52:30 25 quite my question.

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09:52:32 2 MR. BAUGHMAN: I'd like the
09:52:33 3 court reporter to read my question back, and
09:52:34 4 I'd ask you to answer it.

09:52:38 5 MR. CIFUENTES: Jack, we also
09:52:40 6 have five minutes left on the tape.

09:52:41 7 MR. BAUGHMAN: Okay.

09:52:56 8 (The reporter read back as
9 follows:

09:51:40 10 "Question: Do you have any
09:51:40 11 experience or understanding of what defenses
09:51:44 12 the panel ordinarily considers when it's
09:51:47 13 considering an allegation of a breach of
09:51:50 14 general principle 4?")

09:53:01 15 A. I think that's a difficult
09:53:02 16 question to answer, because the Panel will
09:53:04 17 look at general principle 4, and they will
09:53:08 18 decide whether there is a breach of general
09:53:10 19 principle 4 based on the wording of general
09:53:13 20 principle 4. I'm not sure that one can go
09:53:18 21 much beyond that.

09:53:20 22 Q. What is the burden of proof
09:53:22 23 that is applied in considering whether or not
09:53:24 24 there has been a violation of general
09:53:26 25 principle 4?

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09:53:27 2 A. The burden of proof? Well, if
09:53:30 3 you are going to show a breach of a principle,
09:53:33 4 you've got to show -- you've got to -- there
09:53:36 5 has to be -- the Panel will have to be
09:53:38 6 satisfied there is a breach of the principle.
09:53:41 7 So the burden would always be on somebody
09:53:43 8 seeking to show that there has been an
09:53:46 9 infringement.

09:53:47 10 Q. Okay. But what is the burden?
09:53:49 11 Is it balance of probabilities? Beyond a
09:53:53 12 reasonable doubt? Something else?

09:53:55 13 A. You mean the standard?

09:53:57 14 Q. Yes.

09:53:57 15 A. That's not the burden. That's
09:54:00 16 the standard. The burden is whether --

09:54:00 17 Q. It's a difference between
09:54:03 18 American and English usage. Thank you.

09:54:04 19 The standard applied to the
09:54:05 20 burden of proof.

09:54:06 21 A. The standard --

09:54:07 22 MR. GRAVANTE: Objection to the
09:54:08 23 form.

09:54:08 24 A. I haven't -- I haven't looked
09:54:10 25 at it specifically. I would expect it to be

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09:54:13 2 on balance of probabilities, but I would need
09:54:16 3 to check that. You would not normally find
09:54:19 4 beyond reasonable doubt other than on a
09:54:21 5 criminal statute, or where -- or where the
09:54:26 6 rules so apply specifically.

09:54:33 7 MR. BAUGHMAN: I guess why
09:54:34 8 don't we change the tape, and then I'll wrap
09:54:37 9 this up. I think we're very close to done.
09:54:39 10 But I can't finish within the short three
09:54:42 11 minutes left.

09:54:44 12 THE VIDEO OPERATOR: This ends
09:54:45 13 tape 1 of the deposition of Charles Hollander.
09:54:47 14 The time is 9:55 a.m. We're off the record.

09:54:51 15 ---

16 (Recess.)

10:00:45 17 ---

10:00:45 18 THE VIDEO OPERATOR: This is
10:00:49 19 the start of tape 2 in the deposition of
10:00:51 20 Charles Hollander. The time is 10:01 a.m.
10:00:54 21 We're on the record.

10:00:56 22 BY MR. BAUGHMAN:

10:00:57 23 Q. Mr. Hollander, I want to go
10:00:58 24 back a moment to the remedies that are
10:01:00 25 available to the Panel.

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10:01:03 2 Generally speaking, would you
10:01:04 3 agree that one of the remedies available to
10:01:06 4 the Panel is something called "censure"?

10:01:12 5 A. Yes.

10:01:12 6 Q. And would you agree that
10:01:14 7 another remedy available to the Panel is
10:01:16 8 something called "cold shouldering"?

10:01:24 9 A. I think I'd need to be referred
10:01:26 10 to information before I could agree with that.
10:01:30 11 I haven't looked at that specifically.

10:01:33 12 Q. Have you heard the term "cold
10:01:35 13 shouldering" before?

10:01:36 14 A. Yes, but not specifically in
10:01:38 15 the context of the City Code.

10:01:40 16 Q. Okay. All right. Then I'll
10:01:43 17 only ask you about the remedy of censuring
10:01:49 18 then.

10:01:49 19 Can you cite for me any cases
10:01:52 20 that you think have analogous facts to the
10:01:55 21 ones pleaded in the Complaint, where the Panel
10:01:58 22 has issued an order of censure?

10:02:01 23 MR. GRAVANTE: Objection to the
10:02:02 24 form.

10:02:03 25 A. I can't -- I can't quote a case